

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOKOLOW, et al, : 04-CV-397 (GBD)
:
Plaintiffs, : September 30, 2013
:
v. : 500 Pearl Street
: New York, New York
PALESTINE LIBERATION ORGANIZATION, et al, :
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY DISPUTES
BEFORE THE HONORABLE RONALD L. ELLIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Good morning. This is Judge Ellis. Can
2 I have your appearances beginning with the plaintiffs?

3 MR. HORTON: Yes. This is Philip Horton from Arnold
4 & Porter.

5 MR. TOLCHIN: And Robert Tolchin from the Berkman
6 Law Office.

7 MR. HILL: And Brian Hill and Mark Roshan for the
8 defendants, Your Honor. Good morning.

9 THE COURT: This is a conference in Sokolow v.
10 Palestine Liberation Organization, et al., 04-CV-397. It is
11 Monday, September 30th at approximately eleven a.m. This
12 conference is the result of an application from the defendants
13 to enter a protective order [inaudible] the Palestinian
14 Authority from making any further production of information
15 contained in the General Intelligence Services file.

16 As I understand the arguments raised by defendants,
17 they believe the application is appropriate and timely as a
18 follow up to my July 26th order which the defendants indicate
19 did not foreclose the submission of redacted information in
20 the form of a privilege log but allowed an in camera
21 submission of the redacted material.

22 Let me begin by saying that the July 26th order in
23 fact was a written confirmation of the court's ruling in the
24 June 17th conference and that the court because of the
25 difference in time between the July 26th order and the June 17th

1 conference indicated at the end of the order that the parties
2 time to object to the court's June 17th rulings would run from
3 the time of the order.

4 As an initial matter the question is how should the
5 court consider the application filed by the defendants at this
6 time in their August 13th letter. First, with respect to
7 whether or not the submission is really a request for
8 reconsideration, I think it's fairly clear that as a request
9 for reconsideration it would be untimely and that there was
10 certainly ample time after the July 26th order and certainly
11 after the June 17th order for any issues concerning any
12 ambiguities in the court's opinion to be brought to the
13 court's attention.

14 More importantly, I don't find that the order, the
15 July 26th order is ambiguous. While the defendants point out
16 that they -- the redactions were not at issue while my
17 recollection doesn't indicate that that's entirely true
18 because it does appear to me that we had discussed the
19 possibility of redactions but more importantly the allegation
20 that redactions were not at issue is not accurate because what
21 was at issue was whether or not the defendants would be
22 allowed to assert privilege based upon the documents in the
23 GIS file. Obviously if there's no privilege we don't get to
24 reach the redaction issue and to the extent that the
25 defendants did not either at the conference or before the

1 conference or subsequent to the conference demonstrate the
2 applicability of the privilege then they were not entitled to
3 make any redaction to the information submitted to the
4 plaintiffs.

5 I find that regardless of how the application by
6 defendants is characterized the order on July 26th
7 characterized the situation justly.

8 It was plaintiff's application to the court to
9 compel production of documents listed on the defendant's March
10 19, 2013 privilege log. With respect to that, the court's
11 unequivocal determination was that the plaintiff's application
12 is granted. Since I don't see any uncertainty in terms of
13 what was ordered I don't see any merit to the application by
14 defendants and to the extent that the defendants have invited
15 me to look at the information which they say would be highly
16 sensitive [phone cuts out] they have -- in failing to [phone
17 cuts out] to bring this issue to a head earlier the court
18 does -- declines the effort to bootstrap the argument on
19 privilege by reviewing the documents.

20 The defendants certainly had opportunity and I --
21 frankly I'll admit to you I don't know what applications were
22 made to Judge Daniels in terms of my order and so I don't know
23 whether or not there was any request to stay but certainly
24 there was no request from me to stay. The defendants are
25 directed to produce an unredacted copy of the document by the

1 end of business October 2nd. Any questions?

2 MR. HILL: Your Honor, this is Brian Hill. I believe
3 I understand your ruling. I disagree with that decision but I
4 won't reargue it here. May we have a stay pending whether or
5 not we take a Rule 72 appeal because I need to talk with my
6 colleagues about whether we wish to do that?

7 THE COURT: The answer is no. If you can -- you can
8 talk to your colleagues, you can talk to your clients. I
9 didn't require you to produce it by end of the day today
10 because it seems to me you could have done that. The stay you
11 get is I gave you until the end of the day on October 2nd. You
12 can make whatever decisions you make by then.

13 Anything else?

14 MR. HORTON: Your Honor, this is Phil Horton. Just
15 one point of clarification. In our letter to the court in
16 response to their most recent application we pointed out that
17 it appears that even the documents that they produced in
18 redacted form are not all of the files because they refer to
19 various documents which were not produced at all. So I would
20 ask for clarification that all documents be produced, not just
21 those which they produced in redacted form.

22 THE COURT: Well, actually I didn't think that
23 required to be said. It did seem to me that the application
24 that the plaintiffs had was to compel productions of documents
25 that were listed on the privilege log and -- are you saying

1 that some of the documents that are listed on the March 2013
2 privilege log were not produced?

3 MR. HORTON: Here's the problem, Your Honor. The
4 March 19 log by and large did not list individual documents.
5 It simply referred to files and then that was -- and then the
6 more recent privilege log which they produced following your
7 July 26th order was longer and listed a number of individual
8 documents. But we submitted a declaration from Mr. Spitzen, a
9 former Kernel and Israeli defense forces who's used to dealing
10 with these documents who went through had them translated, the
11 redacted copies, and said even the ones which they now produce
12 refer to yet additional documents which are nowhere to be
13 seen. They're not listed on the log. They were not produced.
14 So the original log is simply files. As long as the -- as
15 long as your order goes to all of the responsive documents in
16 the hands of the GIS I think that will be sufficient.

17 THE COURT: Well, let me put it to you this way. It
18 seems -- again, I'm not sure that it's necessary to state what
19 ought to be obvious, and as you stated all responsive
20 documents should have been produced except to the extent that
21 there was a claim of privilege. So I thought that we were
22 only talking about documents that alleged privilege. But to
23 the extent that they are responsive to your request for
24 production they are required to be produced and if there's any
25 question about that I now declare that the order covers all

1 responsive documents in those files whether or not there are
2 claims to be privileged.

3 MR. HORTON: Thank you, Your Honor. That's exactly
4 what I was looking for.

5 MR. HILL: Your Honor, this is Brian Hill. May I
6 just have one point of clarification since I asked for it in
7 June and I apparently maybe had waited too long? But when you
8 say responsive documents, do you mean the documents they've
9 asked for or do you mean documents that are relevant to the
10 case? Because these document requests are for all files on
11 named persons most of which do not have anything to do with
12 this case. They post-date the attacks at issue. They have to
13 do with, for example, the subsequent events that have happened
14 with those individuals lives and they have nothing to do with
15 this case whatsoever. So when you say responsive, do you mean
16 I must turn over the client's current intelligence files on
17 persons that are suspected of being involved in these attacks
18 that were compiled after the attacks that have nothing to do
19 with the attacks?

20 THE COURT: Okay. Well, let me -- again, I don't
21 recall which issues were made -- were made by the parties.
22 But I don't recall us discussing the question of relevance.

23 MR. HILL: Your Honor, we haven't because it came up
24 in the context of privilege. The qualified privileges require
25 the court to weigh the plaintiff's need for the documents

1 against the importance of the defendant's assertion of
2 privilege which is in this case is a Palestinian statute that
3 I think everyone agrees applies. But Your Honor has not
4 reached the substance of the relevance question. You've
5 instead ordered that they be produced without reaching that.
6 So I just -- I need some guidance from the court here. We
7 have current intelligence of people that have nothing to do
8 with the case.

9 THE COURT: My point about saying that we never
10 discussed relevance is that first of all, the rules only
11 require you to produce relevant documents. So that's always a
12 part of any order. But, again, no one has -- neither side has
13 put at issue the relevance of the documents and so I have not
14 ruled on that. But any order I make under Rule 26 only
15 applies to relevant documents but --

16 MR. HILL: I thank you for that clarification, Your
17 Honor.

18 THE COURT: But I don't know what that covers in this
19 case. So --

20 MR. HORTON: Your Honor, this is Phil Horton. I now
21 think we have a big problem because you've ordered -- we
22 requested certain documents and they objected on grounds of
23 privilege. That argument has now been dismissed and it's been
24 dismissed twice. They should now be ordered to produce all
25 documents that respond to our request and it's not up to

1 defendants to go through the responsive documents and say to
2 themselves well, I don't think this one is relevant so I'm not
3 going to produce it.

4 MR. HILL: Well, Your Honor --

5 MR. HORTON: The order was to produce responsive
6 documents. If they thought the request were overly broad and
7 did not seek relevant documents they should have sought relief
8 from that months ago. It's far too late in the game for them
9 now -- they're going to do exactly the same thing they did
10 before. They're going to go through the documents and they're
11 going to pick and choose what they do and do not want to
12 produce based on their internal views as to what they think is
13 relevant. It's not up to a producing party to decide whether
14 a document is relevant. If it's responsive and it's now ruled
15 that they don't have the right to assert a privilege then they
16 have to produce a responsive document. It's far too late in
17 the day to go back and say well, now let's argue about what's
18 relevant which they should have done months ago.

19 MR. HILL: Your Honor, we also lodged --

20 THE COURT: Counsel, first of all, I think as
21 plaintiff you overstate the issue, that is if you are correct
22 then -- if plaintiffs are correct that would mean that we
23 would throw relevance out the window. As to the timeliness
24 issue of raising relevance that's different from saying that
25 you're required to produce all responsive documents. That

1 could be an inordinate number of documents which is -- which
2 creates additional problems.

3 It is true that the issue was not keyed up for me to
4 decide on relevance and I appreciate the concern that the
5 plaintiffs have about how the defendants are going to handle
6 the issue but I'm not going to order that all documents
7 that -- I'm not exactly sure what are all the arguments that
8 the defendants made when the requests for production was made.
9 If the issue is whether or not the plaintiffs never raised any
10 relevance issues then demonstrate that to me and then we'll
11 talk about it but I under -- if I understand the plaintiff's
12 position it's that the defendants only claimed privilege and
13 did not say that the documents or any of the documents were
14 not relevant. Is that what you're saying?

15 MR. HORTON: Yes. Our position is that we sought
16 responsive documents. They claim that they're not privileged
17 -- that they are privileged. That has now been rejected twice
18 and it's too late in the day for them to go back and say well,
19 even though we're not -- we're now going to take the documents
20 which we had sought to withhold on grounds of privilege and
21 we'll produce some if we think we're relevant -- if we think
22 they're relevant but if we, the defendants, unilaterally think
23 they're not relevant they simply won't produce them. So I
24 will have sought documents and I'm not going to get them just
25 because they think that they're not relevant.

1 THE COURT: I will say this. I think it is
2 appropriate that if a party believes documents are not
3 relevant that they do make that known and that they don't make
4 their argument serially. So to the extent that the defendants
5 did not claim that the documents were irrelevant if that's
6 your argument and that's demonstrated then I'll rule on it on
7 that basis but not strictly on the question of whether or not
8 they're responsive. It's more of a waiver issue, that is you
9 can't -- you can't have three or four grounds for objecting
10 and bring them one at a time.

11 But if as it seems to be you're alleging the
12 plaintiffs have never asserted that any of the documents that
13 are in the GIS file were irrelevant then this may be the
14 result but I'm not sure that that's an established fact.

15 MR. YALOWITZ: If I may, Your Honor. This is Kent
16 Yalowitz. I just -- I think that relevance is not really the
17 issue. I thought the issue was reasonably calculated to lead
18 to the discovery of relevant evidence. Maybe it's --
19 everybody is just using a shorthand but --

20 THE COURT: We know what we [inaudible] relevant
21 [inaudible].

22 MR. YALOWITZ: I'm sorry.

23 MR. HORTON: The reason we're relevant there is what
24 we sought are the files on a number of individuals who are the
25 perpetrators of the attacks in this case. How can anything

1 that is in the files of the defendants regarding the
2 perpetrators who they say they're not responsible for their
3 actions but these are the perpetrators of the attacks in this
4 case. A request to see the documents they have on the
5 perpetrators by definition has to be reasonably calculated to
6 lead to the discovery of admissible evidence.

7 THE COURT: Let me be clear. Maybe I'm not being
8 clear. If your argument is that these documents are
9 necessarily relevant I can have the parties argue that. If
10 your argument is that the plaintiffs have never raised
11 relevance that's a different issue. I thought you were saying
12 the latter, that is that they've never raised relevance, that
13 they were going on privilege and therefore they can't say
14 okay, we lost on privilege, now we'll talk about relevance.

15 But in most of these cases, and when I look at it we
16 get the blunderbuss, that is there are objections that are
17 based on privilege, there are objections based on relevance,
18 there are objections based on over breath, objections based on
19 burden. I get 20 pages of preface before I even get to
20 anybody trying to answer. But I agree with you, no party can
21 sort of hold their things in reserve and say well, okay, we'll
22 try one and if that doesn't work we'll try another. But if
23 the defendants in this case did raise relevance I don't know
24 that that means that -- because the privilege has been shot
25 down that that means that the parties never focused on

1 relevance that therefore they've somehow waived it.

2 MR. HORTON: They raised relevance, Your Honor, I
3 believe only in the context of privilege. One of the
4 privileges that they asserted was the so-called law
5 enforcement privilege which if one were to get to the merits
6 on it, and here they waive the right to do that because their
7 log was deficient, calls for a balancing test of a number of
8 factors and we believe that that balance would clearly be
9 struck in the interest of disclosure here, that the law
10 enforcement privilege would not apply.

11 So the only place they raised relevance was to say
12 if one were to go through the full analysis on privilege we
13 should be allowed to withhold them because they're not
14 relevant enough and that's a factor which weighs in our favor.
15 But the court never reached that because their log was
16 considered insufficient. So by necessity they've lost the
17 right to raise that.

18 THE COURT: Again, I'm trying to make myself clear.
19 I hear what you're saying. I've not reviewed it. If in fact
20 what you've just alleged is true, that the only way they've
21 raised relevance was in the context of privilege then that's a
22 different issue than if they've never raised -- then if
23 they've raised relevance generally. But I haven't been
24 reviewing all of these things in depth but if that's your
25 assertion, if it wins the day then we'll deal with it that

1 way.

2 Are the defendants conceding that they've not raised
3 relevance except in the context of privilege?

4 MR. HILL: No, Your Honor. In fact, our objections
5 did object to each of these requests as being among other
6 things irrelevant and unlikely to lead to the discovery of
7 admissible or relevant information. So that's been preserved
8 under Rule 34.

9 MR. HORTON: But that's not what they raised, Your
10 Honor, in response to our motion to compel. We moved to
11 compel on grounds of privilege. It was -- if they had
12 objections to producing the documents it's long past time for
13 them to bring that issue to the court and not to simply say
14 well, months and months ago we tossed the word relevance into
15 our response to Rule 34 so we have to start all over again.

16 THE COURT: I understand what the parties are saying
17 but let me back you up just a minute and -- this is talking
18 about files that are referenced in the response?

19 MR. HILL: Yes, Your Honor.

20 THE COURT: And this is the first time that they were
21 referenced?

22 MR. HORTON: When we actually saw the redacted
23 documents that they produced. Obviously we don't know
24 everything they said because they were so heavily redacted but
25 we actually saw relev -- we saw references to other documents

1 regarding these same individuals whose files we sought and
2 those were not produced in redacted or other form which made
3 us very concerned that not only were they withholding grounds
4 on a privilege argument they lost but there are in fact other
5 documents in the files which they're simply refusing to
6 produce at all even if they lack a claim of privilege.

7 THE COURT: But you're not alleging that they were
8 even disclosed in the privilege log.

9 MR. HORTON: Correct, because the original privilege
10 log didn't disclose individual documents. It simply referred
11 to various files or dossier's. It didn't do what a privilege
12 log is supposed to do which is to go through on a document by
13 document basis.

14 THE COURT: Mr. Hill.

15 MR. HILL: Yes, Your Honor.

16 THE COURT: I confess that in the month that had
17 passed I'm not -- I don't remember in detail what was in the
18 privilege log but is that accurate that the privilege log
19 refers to files, not documents?

20 MR. HILL: Your Honor, what we did is because the way
21 the agency maintains the material is by person we lodged an
22 objection to privilege for each of the requests by person
23 which covers all of the material in the file. The file is not
24 always located in the same physical location but it was
25 intended to cover all of the material. We separately objected

1 that the material sought was irrelevant and there was never a
2 motion to compel that would overrule our relevance objections
3 and there's been no ruling on the relevance of the documents.
4 The only ruling you've made to date as you clarified it today
5 is that the log itself was insufficient to carry the
6 privilege.

7 So you've never evaluated the relevance of these
8 materials and the concern is frankly that there's a lot of
9 irrelevant stuff that has nothing to do with these attacks.
10 It has to do with things that happened after the attack and
11 the intelligence agency's assessment and monitoring of the
12 people involved. So that's the material that is particularly
13 sensitive and protected by Palestinian law and I understand
14 Your Honor's ruling. I disagree with it about the privilege
15 but if the privilege -- if you were to engage on the substance
16 of the privilege you would be required to weigh the importance
17 of that information against the importance of the privilege.

18 So I think it's been crystal clear all along that
19 we've objected to these materials both as being privileged and
20 being irrelevant. I understand you disposed of the privilege
21 issue for the moment but there's never been any ruling from
22 you about relevance of the material particularly the material
23 that post dates the attack which by nature could not relevant
24 or certainly if it doesn't refer to the attacks could not be
25 relevant.

1 THE COURT: Well, it's interesting to hear you argue
2 but let's just go ahead and hear what appears to be the
3 loophole here, and that is whether or not the information that
4 is more particularized in the files is relevant under Rule 26.
5 I will give you the opportunity to do some more homework. I
6 will allow you to submit to me by the end of the day tomorrow
7 why each -- and, again, this is the heart question. This is
8 not the waiver question. This is whether or not the documents
9 that have been referred to as individual documents as opposed
10 to file and as you're discussing them whether or not they were
11 before or after the incident, whether or not they are relevant
12 under Rule 26.

13 I've heard some snippets of the arguments that the
14 plaintiffs make as to why they are inherently relevant. I
15 haven't heard exactly what -- I'll give you an opportunity to
16 flush that out. I'll make -- there's a limit of five pages
17 for each of you by the end of the day tomorrow.

18 Anything else?

19 MR. HORTON: I'm sorry, Your Honor. Are you
20 contemplating simultaneous filings at the end of the day
21 tomorrow?

22 THE COURT: I'm contemplating simultaneous filings at
23 the end of the day tomorrow and then just so that -- I don't
24 jump the gun you can each respond by the end of the day the
25 day after tomorrow.

1 MR. HILL: Thank you, Your Honor.

2 MR. HORTON: Yes. Thank you, Your Honor.

3 THE COURT: Then this won't be an issue as to whether
4 or not the class of documents we're talking about has been
5 ruled on for relevance. Anything else?

6 MR. HILL: No, Your Honor.

7 MR. HORTON: Thank you, Your Honor.

8 THE COURT: We'll be adjourned. Thank you.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Shari Riemer

7 Dated: October 2, 2013
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